Supreme Court, U. S.
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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1535

JOHN McGRATH,

Petitioner,

v.

STEVEN JOHN SLOTKIN, an infant by his mother and natural guardian CHARLOTTE SLOTKIN, and CHARLOTTE SLOTKIN, as Executrix of the Estate of BERT SLOTKIN, deceased,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Preliminary Statement

Respondents respectfully pray that the petition for a writ of certiorari submitted by petitioner John McGrath be denied in all respects. The bases for this request can be simply stated. First, the instant case turns on

the law of New York State notwithstanding petitioner's attempt to concoct constitutional issues. Secondly, the claims made by petitioner for a writ of certiorari were reviewed and re-reviewed, by the Court of Appeals for the Second Circuit and have been the subject of two additional, unsuccessful applications for re-review by that Court. Thus, the Court of Appeals considered and rejected petitioner's claims on four different occasions. It is respectfully submitted that the factors mentioned above —the fact that the Court of Appeals' decisions rests on state, not federal, law and the fact that the Court of Appeals considered and rejected petitioner's claims on four different occasions—make this action an extremely poor candidate for a writ of certiorari.

Statement of Facts

The instant action evolves from a state court malpractice case brought by the respondents herein, a brain-damaged child and his mother (App. 22-23)*. That action was settled for $185,000, just under the figure defendants' counsel therein represented to be the "policy limit", $200,000 (App. 23). In point of fact, there was an additional $1 million in excess coverage undisclosed by defendants' counsel therein (*Id.*).

Following the enforcement of the $185,000 settlement, respondents herein instituted an action against the present petitioner and others. In essence, respondents claimed that petitioner John McGrath and other named defendants fraudulently represented the insurance coverage to

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* All such references, unless otherwise indicated, refer to pages in the appendix to the petition for a writ of certiorari. Said appendix contains the decisions below.

be only $200,000 and thereby induced respondents to settle the state court action for a fraction of the recoverable damages. Respondents claimed as damages the difference between the $185,000 settlement and the true worth of the medical malpractice claim, i.e., the amount that would have been awarded absent the fraudulent inducement to settle.

A full jury trial of respondents' case was held in the District Court for the Southern District of New York before Judge Pollack. As might be expected, the trial was protracted for respondents were, in effect, required to try two cases in one—the merits of the case sounding in fraud and the merits of the state court malpractice case (the case within the case).

At the conclusion of the trial, the jury returned a verdict in favor of respondents herein and against, among others, the petitioner herein, John McGrath (App. 50). However, in their apportionment of the damages, the jury did not allocate any damages as against petitioner John McGrath (*Id.*).

Subsequent to the jury's verdict in favor of respondents, Judge Pollack granted defendants' motion for a directed verdict and dismissed respondents' complaint as to all named defendants including petitioner McGrath. Judge Pollack's decision appears on pages 1 through 16 of petitioner's appendix. A reading of that decision will clearly show that the dismissal of the complaint was based on one and only one basis—Judge Pollack's belief that, *under the law of New York,* a victim of misrepresentation waives the fraud if he proceeds to execute the agreement notwithstanding his awareness of the misrepresentation. In other words, Judge Pollack believed that, by enforcing the $185,000 settlement after they became aware of the excess coverage, respondents herein waived

any claim for fraud which may have existed under New York State law.

Respondents appealed to the Court of Appeals for the Second Circuit. Respondents there claimed that the District Court erred in its interpretation of the law of the State of New York and that the enforcement of the $185,000 settlement did not, under New York law, constitute a waiver of the claim for fraud. The Court of Appeals, in a lengthy opinion which occupies pages 20 to 57 of petitioner's appendix, agreed. Accordingly, the Court reversed the district court's dismissal of the complaint and ruled that respondents may either reinstate the verdict and judgment of $680,000 against petitioner John McGrath (among others)*, or may retry the case against the defendants (including the present petitioner and excepting defendant George Berkowitz since the Court determined that there was insufficient evidence to support a verdict against defendant Berkowitz).

An analysis of the decision of the Court of Appeals reveals that said decision rested entirely on New York law. Thus, the Court held:

> "The law of New York is clear that one who has been induced by fraudulent misrepresentation to settle a claim may recover damages without rescinding the settlement" (App. 42).

Indeed, the Court explicitly stated that, even if it believed the New York rule to be unsound, "we would of course nevertheless be bound by that rule" (*Id*).

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* With respect to the apportionment of damages between the defendants, the Court noted that, under New York law, respondents herein were entitled to enforce the entire judgment against any liable defendant inasmuch as the defendants' claims for contribution against the other defendants did not affect or limit respondents' right to enforce the judgment in whole or in part against any joint tortfeasor (App. 55-57).

Following the Court of Appeals' reversal of the order below, petitioner John McGrath moved for rehearing and rehearing en banc of the decision of August 29, 1979 reversing the District Court's dismissal of the complaint. In support of his petition for rehearing, petitioner John McGrath raised several arguments which petitioner repeats in his petition for certiorari. It suffices to note that the Court of Appeals, by decision dated December 10, 1979, considered and rejected petitioner's constitutional arguments on non-constitutional, alternative grounds. See appendix pages 72-73.

With respect to the alleged procedural error of dismissing the jury after the first jury verdict before it could be polled (the subject of Point I of the petition), the Court clearly noted that it was not necessary to reach the constitutional claim inasmuch as the second verdict, finding liability as to petitioner McGrath, was sufficient to support liability as to John McGrath (ASpp. 72-73). In so ruling, the Court relied on well established New York and federal law. See cases cited at pages 55-57 and 73 of the Appendix.

Undaunted by the second rejection of his arguments, petitioner McGrath moved for permission to file a supplemental brief and said motion was granted by order dated January 21, 1980 (App. 75-77).

By order dated January 31, 1980, the Court of Appeals rejected petitioner's claims a *third* time and declined to rehear en banc. The order by Chief Judge Kaufman notes that "no active judge or judge who was a member of the panel" requested that a vote be taken on the suggestion to rehear en banc (App. 78-79).

Petitioner McGrath again moved to file a supplemental brief and said motion was denied by order dated February 27, 1980 (App. 79-81).

Thus, the Court of Appeals for the Second Circuit considered the merits of petitioner's arguments on two different occasions, and, on two other occasions, refused to reconsider its prior decisions.

Reasons for Denying the Writ

It is clear that the decisions below rest entirely on the law of New York State. It is equally clear that the arguments advanced by petitioner McGrath were fairly considered by the Court of Appeals for the Second Circuit on two occasions, and, on two other occasions, the Court of Appeals declined to reconsider its resolution of the issues. It is respectfully submitted that these factors render the instant case an extremely poor candidate for a writ of certiorari.

CONCLUSION

For these reasons, John McGrath's petition for certiorari should be denied.

Dated: May 7, 1980
New York, New York

Respectfully submitted,

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